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Issue Date: 25 January 2005

CASE NO.: 2004-LHC-1006

OWCP NO.: 07-168528

IN THE MATTER OF

TIMOTHY J. ADAMS,
Claimant

v.

NORTHROP GRUMMAN SHIP SYSTEMS, INC.,
Employer

APPEARANCES:

Michael G. Huey, Esq.
On behalf of Claimant

Paul B. Howell, Esq.
On behalf of Employer

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (The Act), brought by Timothy J. Adams (Claimant) against Northrop Grumman Ship Systems (Employer). The formal hearing was conducted in Mobile, Alabama on October 20, 2004. Each party was represented by counsel, and each presented documentary evidence,

examined and cross examined the witnesses, and made oral and written arguments.[1] The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-5 and Employer's Exhibits 1-26. This decision is based on the entire record.[2]

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The injury/accident occurred on June 18, 2002;
2. Whether the injury/accident was in the course and scope of employment is disputed;
3. An employer/employee relationship existed at the time of the injury/accident;
4. The date Employer was advised of the injury/accident is disputed: Claimant contends he notified Employer on June 18, 2002, Employer contends Claimant reported the injury on October 24, 2003;
5. A Notice of Controversion was filed October 30, 2003;
6. An informal conference was held on January 21, 2004;
7. The average weekly wage at the time of injury was $658.80;
8. Temporary total disability and temporary partial disability is disputed;
9. Medical benefits have not been paid; and
11. Maximum medical improvement has not been reached.

Issues

The unresolved issues in this proceeding are:

1. Whether Claimant was injured;
2. Whether Claimant's injury is job-related;
3. Section 12 timely notice;
4. Whether claim is Section 13 time-barred;

[1] The parties were granted time post hearing to file briefs. This time was extended up to and through December 20, 2004.

[2] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __"; Joint Exhibit- "JX __, pg.__"; Employer's Exhibit- "EX __, pg.__"; and Claimant's Exhibit- "CX __, pg.__".

5. Claimant's entitlement to temporary total disability benefits from June 18, 2002 to January 12, 2003;
6. Claimant's entitlement to temporary total disability benefits from May 1, 2003 until the present and continuing;
7. Section 7 medical benefits; and
8. Attorney fees, penalties, interest and expenses.[3]

Statement of the Evidence
Testimonial and Non-Medical Evidence

Timothy J. Adams

Claimant testified that he is 41 years old and lives with his wife in Mobile, Alabama. Claimant reached the 12th grade in high school and later obtained his GED. Before working for Employer, Claimant was an amateur and professional boxer for thirteen years. He said he sustained injuries while boxing, including a detached retina in his left eye and a broken ankle. Claimant stated he has "a bad memory," but could not say whether it was related to boxing. Claimant has also worked as a welder and a truck driver. Claimant is six feet, five inches tall and weighs 300 pounds.

Claimant was hired by Employer on September 18, 1990 as a shipfitter/welder. He said this position consisted of "all kinds of jobs." His tool bag weighed 80 to 85 pounds, and he moved plates weighing 150 to 200 pounds. Claimant said that the position required a lot of overhead work, bending, stooping, crawling, and climbing ladders and scaffolds. While working, he wore ear plugs, safety glasses, shoes, a hard hat, gloves, and steel-toed boots. Claimant reported working on mostly steel surfaces, and recalled "walking on steel constantly."

Prior to 2002, Claimant had problems with his feet, including an ingrown toenail on his big toe and corns. Claimant testified that on June 20, 2002, he went to Employer's personnel office to inform them that he was having a "procedure" performed on his foot and would have to miss work. He said that he followed Employer's procedure in reporting to the personnel department, where a woman named Annette McKenzie had Claimant's paperwork completed which indicated that his injury was non-industrial. This form is found at Employer's Exhibit 2, p.1. Claimant stated that he did not complete the form but he did sign it.

[3] Though not listed as an issue, Employer applied for Section 8(f) relief, but this issue is mooted by my findings.

Claimant testified that every time he missed work, he provided a doctor's excuse. Further, he said that while he was removed from work, a slip was sent to Employer by his doctor every 30 days. He said that either he would bring the slips to Employer or that his physician's office would fax them.

Claimant was released to return to work on January 13, 2003. He said that he returned to work but "went back in limping," and worked despite the fact that his feet continued to cause him pain. Claimant said that he followed procedure and brought the slip allowing him to work to his supervisor. He said that when he needed to leave work to go for follow-up appointments, he told his supervisor and obtained a gate pass. Claimant had four or five medical appointments during this time and stated that every time, he told his supervisor that he was going to the doctor because of problems with his feet and having to wear steel-toed boots. Claimant worked for Employer in his usual shipfitter/welder position until May 1, 2003. Claimant was removed from work at that time in order to undergo a second set of surgeries, and has not worked for Employer since May 1, 2003.

In October 2003, Claimant had an appointment with Dr. Borcicky, his treating podiatrist. Claimant said that Dr. Borcicky told him on this date that his injury was job related, and he thought a worker's compensation claim had been filed. Claimant went to Employer's infirmary and filed an injury report. Claimant said that he had no experience with worker's compensation and did not know how to proceed with filing a claim, but once he found out what the procedure was, he went to Employer to file an accident report.

On November 4, 2003, Dr. Borcicky released Claimant to sedentary work with restrictions, including limiting standing or easy walking to10 to 15 minutes per hour, no stooping or carrying, and the requirement of extra foot support. Claimant currently works as a doorman at a bar earning $50 per night. He stated that he is scheduled to work Thursdays, Fridays and Saturdays, but because Thursdays are slow for business, he usually earns only $100 per week. Claimant testified that he has not worked since a hurricane hit the city, but he plans to go back to the bar, though he believes that someone else has been hired.

Claimant's last surgery was February 21, 2004. He stated that he has seen several physicians for a second opinion, including Dr. Salloum, an orthopedist in Gulfport, who Claimant says wants him to have two more surgeries, and Dr. Benus, another podiatrist. Claimant said that none of the physicians who have treated him have said that he is capable of returning to work as a shipfitter. Claimant said that he still cannot bear weight on the bottom of his left foot where

the last surgery was performed. He stated that his feet were not in this condition when he was hired by Employer.

On cross-examination, Claimant admitted that he had seen Dr. Borcicky in 1985. Claimant did not remember whether he had surgery on his toes in 1991, or whether he saw Dr. Borcicky in 1997 and 1999. Claimant acknowledged that he believes he was injured on June 18, 2002. He was asked about forms completed by Dr. Borcicky wherein he indicated on multiple occasions that his injury was non-industrial in nature.

Claimant clarified that when he reported to Employer's infirmary to complete an accident report, he did so because Dr. Borcicky told him that he should file a worker's compensation case because Claimant had been working on steel surfaces and climbing. Therefore, Claimant went to Employer and told them to file an accident report. Claimant said until that day, he was unaware he could file a compensation claim.

Claimant said that the day he filed the injury report was not the first time that he reported his injury. He said that all of his supervisors knew that he had "bad feet" because they saw him limping. However, Claimant could not recall whether he told anyone at work that the problems with his feet were related to his employment. Claimant acknowledged that his signature was on the choice of physician form designating Dr. Borcicky, though he did not recall completing the form.

Claimant admitted that he was released to sedentary employment on November 4, 2003 but did not attempt to obtain employment until he secured the doorman position at the bar in May 2004. Claimant described his job at the bar as consisting of checking patrons' identification and mostly sitting around. Claimant acknowledged he did not apply for any of the positions identified by Employer's labor market survey. He said that after being on his feet for five minutes, he has to sit down. He said it "killed" him to walk into the hearing from the parking lot, despite the fact he had taken pain medicine and was using a walking brace. He said he is able to drive using his right foot.

Michael S. Stewart

Mr. Stewart testified that he is Employer's shipfitter foreman and has held that position for ten years. Mr. Stewart stated that he knew Claimant before Claimant came to work for him, and opined that Claimant "pretty much" had foot problems the whole time Mr. Stewart has known him. He said that Claimant never

reported any foot injury, never asked Mr. Stewart to provide medical attention to his feet, or asked Mr. Stewart to send him to the infirmary for treatment of his feet. Mr. Stewart testified that Claimant never told him that Claimant's foot problems were employment related, for if he had, Mr. Stewart said he would have sent him to the infirmary, which is the usual procedure.

On cross-examination, Mr. Stewart said that he was Claimant's foreman in 2003. He said Claimant had an average attendance record. He said that the procedure for documenting absences is that he makes a copy of the excuse provided by the employee and keeps it for one year, then sends it to the labor relations department. Mr. Stewart had no recollection of Claimant providing a doctor's excuse in 2003. When he was shown copies of Dr. Borcicky's records which contained multiple work excuses in 2003, Mr. Stewart stated he did not receive them because he would have sent them to the infirmary. He concluded that the excuses must have been faxed by Dr. Borcicky's office directly to the infirmary.

Kerry R. Rushing, Sr.

Mr. Rushing testified that he works for Employer as a general foreman and hull foreman. He has held the general foreman position for one year and has been a hull foreman since 1975. Mr. Rushing stated that he has known Claimant for 15 to 20 years. He said that Claimant worked for him in 2000 and he was aware that Claimant had problems related to his feet. Mr. Rushing said that Claimant never reported a work-related injury regarding his foot. He testified that Claimant never asked Mr. Rushing to complete an accident report, nor did Mr. Rushing refuse to do so on any occasion, and Claimant never asked Mr. Rushing to send him to the infirmary, nor did Mr. Rushing refuse to do so. Mr. Rushing stated that Claimant never told him that his foot problems were in any way related to his employment. On cross-examination, Mr. Rushing acknowledged that Claimant did not work under his supervision in 2002 or 2003.

Shelley W. Berry

Ms. Berry testified that she is Employer's medical administrator and has held the position for three years. She described her duties as including maintaining Employer's OSHA log, communicating with Employer's insurance carriers, and performing daily activities in order to keep Employer's infirmary operational. Ms. Berry explained the procedure in place when an employee visits the infirmary. She stated that the attendant at the front window asks the employee if he needs to file a claim. If the employee is indecisive or presents with vague complaints or symptoms, he will be evaluated by a nurse or paramedic. If it can be ascertained

from the employee's signs or symptoms that the injury is work-related, the employee is sent to complete an injury report. If the staff is of the opinion that the employee's injury is not industrial in nature, the employee is sent to his primary care physician, and an injury report will be generated if that physician feels the injury is industrial in nature. If the primary care physician determines that the injury is not work-related, the employee is referred to Employer's employment office which handles nonindustrial conditions. If the employee is out of work on a non-work related condition, the employment office receives their work slips.

Ms. Berry testified that Claimant did not file an injury report until October 2003. She said that when Claimant originally visited the infirmary, he told them he did not know how he was hurt. She said that perhaps Claimant was examined and blisters or corns were seen on his feet and he would have been told to see his primary care physician. On cross-examination, Ms. Berry stated that when an employee presents to the infirmary, the first thing he would be asked is how the injury occurred, and whether the cause was industrial or not.

David J. Borcicky, D.P.M.

Dr. Borcicky testified by means of deposition that he is a board certified doctor of podiatric medicine. (CX 1, p.3). He explained that although he is not a medical doctor and does not possess a degree from a medical school, as most podiatrists do not, he is permitted by law to perform surgery from the ankle downward, and is legally able to prescribe medications.[4]

Dr. Borcicky testified that he first saw Claimant in the late 1980s. He explained that he used a different charting system at that time, so he no longer had the file, but from memory he believed to have seen Claimant for the treatment of corns, calluses, and mild hammer toes on both feet. He recalled providing treatment of soft tissue surgeries, which involves loosening and lengthening some of the minor tissues and tendons in the toe rather than working directly on the bone.

Dr. Borcicky explained that Claimant's problems were "mechanical in nature," and that there is an inheritance basis that he refers to as a "foot type." He said that problems depend on how the foot moves and shifts. He said there are aggravating factors for foot problems, including shoes, boots, patient weight, how

[4] Dr. Borcicky graduated from the California College of Podiatric Medicine, completed a residency, and has two board certifications which are approved by the American Board of Podiatric Orthopedics and Podiatric Primary Care (CX 1, p.3).

much walking a patient does, and whether they are athletic, including whether they jump, squat, or walk. All of these factors can make foot conditions worse.

Dr. Borcicky recalled treating Claimant in the late 1980s and obtaining a good result, sending Claimant back to work at full duty. He did not see Claimant again until 1997. The records from this visit are located at Employer's Exhibit 20. When Claimant returned in 1997, Dr. Borcicky said his records indicate that his calluses were causing him pain. In addition, he had a toenail problem, a bunion deformity, and hammer toes with severe plantar keratomas (calluses with cores). Dr. Borcicky said he provided conservative care consisting of reducing the calluses with a scalpel, and cushioning Claimant's feet with the use of orthotics.

Dr. Borcicky did not see Claimant again until April 22, 1999, when Claimant returned for a toenail problem. (EX 20, p.2). He said Claimant reported not being able to walk on his left big toe and was having trouble working. Dr. Borcicky's diagnosis was an ingrown toenail, but he also diagnosed bunion deformities and hammertoes on both feet. Dr. Borcicky removed the ingrown toenail during an office procedure, and reported that Claimant achieved a "fine" result, with Dr. Borcicky releasing him to work at full duty.

Claimant returned to see Dr. Borcicky on October 11, 2000 (EX 20, p.4). Dr. Borcicky said that Claimant reported not being able to go to work since October 4 due to severe foot pain. Dr. Borcicky could not remember the exact nature of Claimant's foot problems and could not find his notes relating to that visit. Dr. Borcicky could not remember what treatment he provided Claimant at that visit. The next visit was February 22, 2002, where the record indicates that Claimant presented with complaints of pain at the plantar aspect of the left heel, which had existed for about three weeks (EX 20, p.7). Dr. Borcicky stated that he took heel x-rays and began conservative treatment again, telling Claimant to schedule an appointment to make impressions for custom orthotics. Dr. Borcicky said that the notes from that visit also indicated that Claimant had a bunion deformity with some plantar calluses. He explained that a bunion is a structural deformity; the "bump" of the first metatarsal head of the medial aspect of the foot.

On June 19, 2002, Claimant complained of recurrent heel pain (EX 20, p.9). Dr. Borcicky said that he spoke to Claimant regarding custom orthotics because he believed it would help Claimant's overall foot condition. Claimant also complained of painful bunion deformities and hammer toes, which Dr. Borcicky treated with anti-inflammatory medication and ice. Dr. Borcicky said that he discussed possible surgery with Claimant. Claimant returned on June 21, 2002 to

discuss surgeries and other treatments (EX 20, p.11). Dr. Borcicky said that at that visit, the pre-op workup was scheduled, and a blood sample and x-rays were taken. He said he spoke to Claimant about multiple surgeries to correct his hammer toe, metatarsal, and bunion deformities of both feet. These surgeries would be staged over time, depending on the progression of Claimant's healing.

Claimant underwent a bunionectomy by osteotomy on his left foot on June 26, 2002. Dr. Borcicky explained this procedure as making a surgical cut to the bone and moving it in order to straighten the bone that had shifted over time. The same procedure on Claimant's right foot was performed on August 11, 2002. Dr. Borcicky opined that Claimant fared well, though on July 8 he had to perform an extra nerve block for Claimant's postoperative pain which he said was common.

Dr. Borcicky detailed the various procedures he performed on Claimant, beginning with the bunionectomies discussed above. Next, he performed metatarsal surgeries. He explained that the metatarsals are the bones behind the toes, and they were operated on to address the severe plantar calluses Claimant had. Dr. Borcicky recalled that Claimant had some postoperative problems related to the metatarsal surgeries, because though the procedures were performed to relieve the pressure on the bottom of Claimant's foot by helping the callus, Claimant then had transfer lesions to another callus area (another metatarsal) which meant he needed another surgery. Dr. Borcicky said that these surgeries took place every month or two.

Claimant's fourth toe on his left foot contracted postoperatively, so Dr. Borcicky performed "two or three" surgeries to correct this "postoperative complication," one of which was a syndactlyism where the toes were brought together, which healed the infection. Dr. Borcicky stated that sometime in this time period, Claimant did return to work, but he had problems with his big toes and metatarsals, so Dr. Borcicky performed some adjustments on Claimant's orthotics and several additional surgeries were performed as well. He said that one of the last surgeries he did was related to the left foot in the area of the third and fourth metatarsals where Claimant had developed a soft tissue lesion and a bumpy formation of the bone during the healing process of the previous metatarsals. He said he performed a "clean up" surgery, where he removed scar tissue and shaved the excess bone that was impinging.

Dr. Borcicky said that it was after the "clean up" procedure that Claimant reached his current status and developed postoperative dehiscence, which is a breakdown of tissue, often with the result of infection. Claimant has a one-

centimeter sore area. Dr. Borcicky stated that Claimant has one residual problem which is that his big toe is starting to contract. He said that Claimant gets around with it now, but it may need to be surgically addressed in the future. Claimant also had pain in his left foot which does well with additional bracing and the use of an orthotic. Dr. Borcicky stated that Claimant continues to get some minor calluses but there is "a pretty big improvement" compared to where he started in terms of metatarsal deformities.

Dr. Borcicky estimated that Claimant has had "a dozen" surgeries and has improved. He was currently treating Claimant's dehiscence. Dr. Borcicky opined that Claimant had developed a small postoperative neuroma which is a pinched nerve in the area that has scar tissue. He said Claimant had a localized sore which he estimated would heal in a month or two. Dr. Borcicky opined that Claimant's contracting big toe was a problem that he could not ascertain the severity of. He said that despite the surgeries, Claimant can still get a hammer toe because it is related to a bunion, which is affected by the area being rubbed while Claimant wears boots.

Dr. Borcicky stated that Claimant has not yet reached maximum medical improvement, despite the fact he has been off work for a year and a half. Claimant's Exhibit 2 contains Dr. Borcicky's notes removing Claimant from work. The records indicate that Claimant was removed from work on February 22, 2002 for two days; on June 19, 2002 for 2-3 days; on July 1, 2002 for 3-4 months; and on August 22, 2002 for 2-4 months. On October 3, 2002, he was kept off work for another 2 months, and on December 5, 2002 for an additional month. On December 18, 2002, Dr. Borcicky stated that Claimant could return to a sitting job, but would not be able to wear work boots until mid-January. Claimant was finally released to full duty effective January 13, 2003 (CX 2, p.11). Claimant was subsequently removed for a day or two at a time when he had appointments with Dr. Borcicky, until May 23, 2003, when Dr. Borcicky indicated that Claimant was recovering from recent surgeries and was removed from work until mid-July. This estimate was moved to mid-August on June 23, 2003, but Dr. Borcicky stated that a full return to work would depend on his evaluation of Claimant's abilities to work 8 to 10 hours and to wear work boots.

On July 14, 2003, Dr. Borcicky's note indicates that Claimant had undergone another foot surgery and was to remain off work for two more months to recover. On September 3, 2003, Dr. Borcicky stated that Claimant was slowly improving, but a full return to work was dependent on his ability to wear work boots, and he estimated Claimant would return to work between October 15 and

October 30. On September 22, 2003, Claimant's return date was pushed back to November 3, 2003. Dr. Borcicky's note dated November 4, 2003, states that Claimant was capable of working a sitting job with standing 10-15 minutes of each hour, provided he used extra foot support in the form of a removable cast. He indicated that Claimant was to avoid carrying and stooping. He estimated that Claimant would be able to perform full weight bearing in 6 to 10 weeks but cautioned that it may take longer for Claimant to be able to wear steel-toed boots. The next note, dated March 1, 2004, states that Claimant had an additional foot surgery and was removed from work for six to eight weeks. Finally, on March 31, 2004, Dr. Borcicky stated that Claimant was in a cast and would be off work for two to three months.

Claimant's current problems, according to Dr. Borcicky, include his big toe contracting resulting in a hammertoe, plantar calluses, though they are "greatly improved," and the infection/dehiscence combination previously discussed. He estimated that Claimant could return to work in four to six months if the infection healed. Dr. Borcicky explained Claimant's residual problems by stating that every time a procedure was performed, Claimant "developed something else." He said that Claimant could at that time work a sitting job up to 15 or 20 minutes. Claimant was capable of light work only after the dehiscence healed, and then he would need a "support system," like a Ritchie brace which is an extra-supportive orthotic, and would help Claimant's foot because it would hold his weight.

Dr. Borcicky was uncertain whether Claimant could ever return to his previous occupation as a shipfitter, and was unsure whether he would be able to wear work boots in a full-time capacity. He stated that he did not foresee Claimant continuing long-term without developing new problems or without the old problems getting worse, but he expected that Claimant should be capable of performing semi-weight bearing jobs in jogging shoes with extra support. He anticipated that Claimant would be capable of working a light duty job on a full-time basis.

When asked what Claimant's diagnosis was, Dr. Borcicky stated that Claimant has multiple diagnoses and an additional diagnosis of postoperative problems. He stated there was a third problem of Claimant's "foot type" and a host of aggravating factors, including Claimant's weight, size, and type of work. Dr. Borcicky acknowledged that Claimant had preexisting foot problems, but stated that they were "milder." He explained that Claimant had some foot problems which existed before he worked for Employer, but they were less severe, and the major foot problems progressed over a long period of time. He said that

with a reasonable degree of podiatric certainty, wearing boots and Claimant's type of work definitely accelerated Claimant's condition. He said that Claimant was born with a foot problem that was going to slowly get worse, and the aggravating factors were wearing boots, the surface he worked on, his weight, and type of job. Dr. Borcicky said that boots were not the only factor but were definitely a big factor. Dr. Borcicky opined that Claimant's foot deformities were directly associated with the combination of a weight-bearing job plus wearing steel toed boots (CX 2, p.22). He stated that even without those factors, Claimant still would have had bunions, hammertoe deformity, and metatarsal conditions and deformities, but that the job and wearing boots accelerated and magnified the degree of the deformities.

Dr. Borcicky said that Claimant's job at the bar was acceptable so long as he wore a brace, sat down once he was up for fifteen minutes, and provided his infection did not flare up. He said there was no problem with sedentary work such as a desk job. He stated that once Claimant's infection dehiscence healed, with the use of extra support, Claimant should be able to be on his feet for 20 to 30 minutes doing "easy things," and some easy walking was acceptable.

Employer's Exhibit 2 consists of group disability claim forms completed by Dr. Borcicky. The first is dated June 20, 2002 and both Claimant Dr. Borcicky indicated that Claimant's injury, documented by Dr. Borcicky's diagnosis as hallus abductus valgus (HAV) and hammertoe, did not arise out of his employment. Dr. Borcicky indicated that Claimant had suffered a similar condition ten years ago (EX 2, p.2). The statement dated July 16, 2002 states that Claimant had not had a similar condition, and the condition did not arise out of employment. The report dated August 20, 2002 indicates that Claimant and Dr. Borcicky maintained that Claimant's condition did not arise out of his employment, as did the reports of September 9, 2003, September 24, 2003, October 16, 2002, November 20, 2002, November 27, 2002, and December 9, 2002. The report dated May 1, 2003, indicates that Dr. Borcicky checked "unknown" in response to whether Claimant's condition arose out of his employment, and he commented that work boots aggravated Claimant's conditions (EX 2,p.23). However, on the certificate of attending physician form dated May 23, 2003, Dr. Barcicky indicated that Claimant's total disability was not the result of a work injury or accident (EX 2, p. 24).

Medical Evidence

George T. Salloum, M.D.

Dr. Salloum examined Claimant for the purpose of providing a second opinion on October 5, 2004. His records are located at Claimant's Exhibit 3. Dr. Salloum stated that he had difficulty following Claimant's history and did not have any prior medical records. His records state that Claimant indicated he had thirteen surgeries on his feet. He said Claimant reported having a cast on his foot but took it off the night before, against medical advice, because it was bothering him. He complained of pain in both feet.

Dr. Salloum examined Claimant and noted that when standing, Claimant had mild flatfoot deformity. He observed some clawing with hyperextension of the metatarsophalangeal joint and mild calluses over the plantar aspect of the foot over the metatarsal heads. Dr. Salloum's impression was that Claimant had severe bilateral metatarsalgia.[5] He stated that Claimant would likely benefit from accommodative orthotics, and may need additional procedures in the form of "a deep second, third, and fourth rays on the left foot with a five under four crossover on the left foot." Dr. Salloum opined that Claimant's condition was most likely a pre-existing condition that was exacerbated by his work.

Ingalls Infirmary

The records of Employer's infirmary are located at Employer's Exhibit 21. The only notation is dated October 24, 2003, and states "took R/S" and that benefits were explained to Claimant. The record indicates that Claimant's choice of physician was Dr. Borcicky. There is also a letter dated June 14, 2004 explaining to Claimant that Employer's policy allows up to one year of medical leave of absence and because Claimant had been out for one year, his employment was terminated.

John W. Benus, D.P.M.

Claimant saw Dr. Benus on April 18, 2004. His records comprise Employer's Exhibit 22. Dr. Benus examined Claimant and determined that Claimant suffered from bilateral foot pain. He stated that after reviewing Claimant's complaints and present condition, he felt Claimant would never be able to return to his previous occupation of working at the shipyard or any job that would require walking or standing for any period of time. He said that given the

[5] Metatarsalis is defined as "pain in the forefoot in the region of the heads of the metatarsals." *Stedman's Concise Medical Dictionary*, 4th ed. (2001).

limited history, because he did not have access to Claimant's medical records, he could not determine whether Claimant had a claim for compensation.

Other Evidence

Tommy Sanders, C.R.C.

Mr. Sanders is a certified rehabilitation counselor who conducted a vocational assessment and labor market survey on July 20, 2004. His report comprises Employer's Exhibit 24. In formulating his report, Mr. Sanders reviewed Claimant's application for employment with Employer as well as Dr. Borcicky's records. Mr. Sanders focused on Dr. Borcicky's November 4, 2003 restrictions of a sitting job, standing 10 to 15 minutes or easy walking each hour, no stooping or carrying, and the use of extra foot support. Mr. Sanders noted that Claimant's work experience was semi-skilled to skilled in nature, involving heavy physical activity. He opined that Claimant's work history had not allowed him to develop any significant transferable skills for lighter occupations.

Mr. Sanders conducted a labor market survey which identified two then-existing employment opportunities. Michael's Taxi and Shuttle Service in Mobile had an available dispatcher position. This essentially sedentary position was available 32 to 40 hours per week and paid $5.15 per hour. Duties included receiving customer calls for cab service, dispatching cabs to customer sites, communicating via two-way radio with drivers, and maintaining a log book of calls received and drivers dispatched. Employees were required to be able to read and write and must possess familiarity with the Mobile area.

Apcoa in Mobile had a parking lot attendant position available on a full time basis. This position paid $5.15 per hour and its duties included collecting parking fees from customers, assisting in cleaning the parking lot, including sweeping with a broom and dust pan, as needed. Mr. Sanders reported that the cleaning duty can generally be accomplished intermittently throughout an eight hour shift for a total of approximately 30 minutes, the remainder of the time the employee can sit or stand. The position required the ability to read and write, and provided on the job training. Lifting was limited to the broom and dustpan.

Mr. Sanders identified two other then-available opportunities in the Mobile area. Donovan's Car Wash had two 40 hour per week car wash cashier positions, which required only occasional standing and walking to retrieve stock such as key chains and air fresheners. Lifting was limited to two to five pounds on an infrequent basis, the remainder of the time the employee is allowed to sit or stand.

The worker may occasionally bend at the waist or squat to shelve items. This position paid $5.15 per hour. Yellow Cab Company was hiring a 25 hour per week dispatcher, with the opportunity to progress to full time. Mr. Sanders stated the duties were similar to those for the position at Michael's Taxi. This position paid $5.15 per hour.

Mr. Sanders noted that in January 2004, Standard Parking was hiring a 40 hour per week parking lot cashier with wages of $5.50 to $6.50 per hour. Donovan's Car Wash was hiring during mid-February 2004 for a 40 hour per week, $5.15 per hour car wash cashier. Mr. Sanders stated that with the exception of the two dispatcher positions, the positions required minimal to occasional lifting and/or carrying of five pounds or less on an infrequent basis.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Maher Terminals, Inc*., 114 S. Ct. 2251 (1994) that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates § 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 28 BRBS 43 (1994).

Section 12 Timely Notice

Section 12(a) of the Act provides in relevant part:

> Notice of an injury or death in respect of which compensation is payable under this chapter shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship

> between the injury or death and the employment….Notice shall be given (1) to the deputy commissioner in the compensation district in which the injury or death occurred, and (2) to the employer.

33 U.S.C. § 912(a).

Pursuant to Section 12(a) of the Act, a claimant who sustains a traumatic injury is required to file a notice of injury within thirty days of the date on which he became aware, or should have become aware, of the relationship between his injury and his employment. 33 U.S.C. § 912(a); 20 C.F.R. § 702.212(a).[6] The claimant is entitled to the presumption that the notice was timely filed, and the burden of establishing that notice was not timely filed is borne by the employer. 33 U.S.C. § 920(b); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

If the employer establishes that notice was not filed in a timely manner, the failure to timely file may be excused by Section 12(d), which provides that such failure to file timely written notice will not bar the claim if the claimant shows either that the employer had knowledge of the injury during the filing period, or that the employer was not prejudiced by the failure to give timely notice, or that the failure was excused. 33 U.S.C. § 912(d). In order to determine whether a notice of injury was timely filed, the administrative law judge must make a specific determination as to the date on which the claimant became aware, or should have become aware, of the relationship between his injury, his employment, and the likely impairment of his wage-earning capacity. *See Marathon Oil Co. v. Lunsford*, 733 F.3d 1139, 16 BRBS 100(CRT) (5th Cir. 1984); *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990); *Martin v. Kaiser Co.*, 24 BRBS 112 (1990).

In the present case, Claimant asserts that he was not aware of the fact that his injury was work related until October 24, 2003, the date he claims Dr. Borcicky first informed him of the relation between his injury and his employment. In his post-hearing brief, Claimant acknowledges that on "a gut level" he may have

[6] As the record contains no evidence that Claimant's was an occupational injury rather than a traumatic injury, I find that Claimant's was a traumatic injury, since there is no evidence that his condition is "peculiar to his particular line of work." *See LeBlanc v. Cooper/T.Smith Stevedoring, Inc.*, 130 F.3d 157, 31 BRBS 195(CRT) (5th Cir. 1997); *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989). Accordingly, Claimant had thirty days within which to notify Employer of his work-related injury.

suspected that years of shipyard work had caused his feet to become worse and more painful. Employer, on the other hand, asserts that Claimant was aware of a relationship between his injury and his employment as early as June 21, 2002, as evidenced by his testimony and a statement in his own handwriting on a visit to Dr. Borcicky that walking in steel-toed boots hurt his feet.

Regarding the matter of Claimant's awareness, I find that Claimant was aware or should have been aware of the relationship between his injury, his employment, and the "likely impairment" of his wage earning capacity on June 18, 2002. Claimant testified that he was not aware of a relationship between his injury and his employment until Dr. Borcicky told him so in October, 2003. When asked if October 24, 2003 was the first time Dr. Borcicky told Claimant his foot condition was related to his work for Employer, Claimant testified: "Yes, sir. If I had known that I would have been on workman's comp the first time I went out…but like I said, I didn't know the procedure." (Tr. p.44). However, such testimony is contradicted by other items in the record. For example, when asked in his deposition whether he recalled what he told Dr. Borcicky what was wrong with his feet the first time he saw Dr. Borcicky after "this occurrence," (i.e. June 18, 2002), Claimant testified as follows:

> A: I didn't tell him nothing, sir. I told him they was aching and all.
> Q: Did you tell him it was due to your work?
> A: Yes sir. And he brought it up. He said it was because of my job duties. If I sat behind a desk at a computer, it would be different. I might have some problems but the weight bearing on my feet was the main thing, toting hundred and fifty pound pieces of steel and all, the weight bearing in the boots. (EX 25, pp. 16-17).

When asked how Claimant first relayed his history to Dr. Borcicky, Claimant stated: "I just gave him the history, sir, and he told me it was the weight bearing because I didn't know what was causing it." (EX 25, p. 17). Claimant discussed the treatment provided by Dr. Borcicky, including surgery on his right foot, and explained that he was removed from work for eight months (EX 25, p.20). When asked if he drew group disability benefits during that time, he responded:

> A: Yes, sir. They have insurance in case you get hurt off the job. They said it was non-industrial.
> Q: Who said it was non-industrial?

A: When I went to the unemployment office, so I wouldn't lose my job, she wrote on my paper non-industrial right off the bat. I said, ma'am, it's from working in my boots. When your feet are hurting and you want to get them fixed—so I just left. (EX 25, p.23).

Claimant was also asked about the first period of time he was taken off work by Dr. Borcicky, from June 2002 until January 2003. Specifically, he was asked whether he reported his condition as being work related to Dr. Borcicky during that time, to which he replied: "Yeah, I told him that—you know, he's the doctor. I said, man, this is killing me, being on that steel." (EX 26, p. 22).

At the formal hearing, in explaining his visit to Employer's infirmary on October 24, 2003 after meeting with Dr. Borcicky, Claimant stated that he knew that his injury was work-related but did not know that he could receive compensation. He testified: "I knew my feet, yeah, because of my job….you know I knew it was because of my job every day…this work that I do." (Tr. p. 63).

Claimant testified at the formal hearing that he told Employer's personnel office on June 18, 2002 that it was his boots that were causing him trouble (Tr. p. 24). When asked if Claimant told his supervisor why he was going to see Dr. Borcicky, he testified that he did tell him, and that "[e]verybody around my work there knew it, that I was going in because of my feet, from being in them boots. But it's not just boots. It's weight being on them…." (Tr. p.37). Claimant was asked whether he was aware in June 2002 that his injury was due to his work and he stated "yeah, I told my doctor…and I think it's job related. You know I told the unemployment office that." (Tr. p.55).

I find the aforementioned evidence establishes that Claimant was aware of the relationship between his injury and his employment as early as June 18, 2002, when he reported to the Employer's "unemployment office" (personnel office). He reiterated several times that he told Dr. Borcicky of his belief regarding the connection between his injury and his employment. However, "the fact that the claimant has suffered an accident and is aware that he is injured is not the test; the test is the awareness of the suffering of a compensable injury." *Brown v. Jacksonville Shipyards, Inc.*, 23 BRBS 22, 23(CRT) (11th Cir. 1990). In this regard, the evidence demonstrates that Claimant was also aware of the likely impairment of his wage-earning capacity. In *Brown*, the claimant, who continued to work after his injury, was deemed to have been unaware of any loss of wage-earning capacity until he missed time from work. *See also Gregory v. Southeastern*

Maritime Co., 25 BRBS 188 (1991) (claimant deemed not to have been aware of loss of wage-earning capacity until he was removed from work for surgery).

In the present case, Claimant reported to the "unemployment office" on June 18, 2002 and did not return to work for Employer until January 2003. However, he had been off work for a few days at a time in the past pursuant to Dr. Borcicky's instructions, and Dr. Borcicky's note dated June 19, 2002 excused Claimant from work for "2-3 days." (CX 2, p. 4). Thus, Claimant may have not appreciated that impact on his wage-earning capacity at that point. However, on July 1, 2002, Dr. Borcicky removed Claimant for three to four months. (CX 2, p.5), and I find that certainly by that time, Claimant was aware of the likely impairment on his wage-earning capacity.

In sum, the evidence supports a finding that Claimant was aware or should have been aware of the relationship between his injury, his employment, and the likely impact on his wage-earning capacity as of July 1, 2002. Consequently, Claimant was required to notify Employer of his work-related injury within thirty days of this date.[7] Section 12(b) of the Act provides that such notice "shall be in writing, shall contain the name and address of the employee and a statement of the time, place, nature, and cause of the injury…and shall be signed by the employee or some person on his behalf." 33 U.S.C. § 912(b). Claimant effected formal notice to Employer in the form of an accident/injury report on October 24, 2003. I therefore find that the record contains substantial evidence which rebuts the Section 20(b) presumption that Employer was timely notified of Claimant's injury. Employer has established that Claimant failed to timely notify Employer of his work-related injury within thirty days of his becoming aware of the injury, and consequently, his claim is time barred unless his failure is excused by a provision of Section 12(d).

Under Section 12(d), a claimant's failure to provide timely written notice will not bar the claim if the claimant shows either that the employer had knowledge during the filing period, or that the employer was not prejudiced by the

[7] Claimant avers that the date a claimant is told that there is a work-related injury is the controlling date for establishing awareness (Claimant's Brief, p.3). However, the cases Claimant cites are occupational disease cases where it may be difficult for a claimant to know of his work-related injury because it is not immediately manifested, and therefore a medical diagnosis is dispositive. *See Osmundsen v. Todd Pacific Shipyard*, 755 F.2d 730 (9th Cir. 1985 (claimant suffered from a lung/breathing condition); *Cox v. Brady Hamilton Stevedore Co.*, 18 BRBS 10 (1985) (hearing loss); *Stark v. Lockheed Shipbuilding and Construction Co.*, 5 BRBS 186 (1976) (hearing loss). As previously discussed, Claimant's injury is of the variety of a traumatic injury, and his condition had manifested itself to him as evidenced by his documented reports of pain, etc.

claimant's failure to give timely notice. *Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986). The employer bears the burden of demonstrating through substantial evidence that due to the claimant's failure to provide timely notice, it did not have knowledge of the injury and that it was prejudiced by the claimant's untimely notice. *I.T.O. Corp. v. Director, OWCP,* 883 F.2d 422, 22 BRBS 126(CRT) 5th Cir. 1989). The Board and the courts generally require that in order for an employer to be charged with imputed knowledge under Section 12(d), an employer must have knowledge of both the claimant's injury *and* the work-relatedness of that injury. *See Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 15 BRBS 299 (1983); *Sun Shipbuilding & Dry Dock Co. v. Walker*, 684 F.2d 266, (3d Cir. 1982), *aff'g* 14 BRBS 132 (1981). The Board and the courts have also held that the Section 12(d) knowledge exception is precluded where the claimant previously certified on his group health insurance form that his injury was not work-related. *See Sun Shipbuilding & Dry Dock Co. v. Walker*, 590 F.2d 73, 9 BRBS 399(CRT) (3d Cir. 1978), *rev'g* 7 BRBS 134 (1977); *Sheek v. General Dynamics Corp.*, 18 BRBS 1 (1985). The rationale supporting this preclusion has been explained as refusing to impose the duty on an employer to investigate the accuracy of a physician's diagnosis or of an employee's certification. *Sun Shipbuilding*, 9 BRBS at 403.

In the present case, I find that that Employer's knowledge of Claimant's ailments are not sufficient to charge Employer with knowledge of a work-related injury. While Employer was aware that Claimant was removed from work due to medical reasons as evidenced by the multiple "off-work" slips completed by Dr. Borcicky, merely knowing that Claimant was on medical leave is not sufficient to impute knowledge of a work-related injury. The record contains evidence of nine occasions where Dr. Borcicky indicated on group disability forms that Claimant's condition was unrelated to his employment, and Claimant so certified by signing the forms. (EX 2). Accordingly, I find that Employer did not know of the possibility that Claimant's condition was work-related until October 24, 2003, when formal notice was given. Therefore, Claimant's failure to timely notify Employer cannot be excused pursuant to Section 12(d).[8]

As to being prejudiced, prejudice under Section 12(d) may be established where the employer demonstrates, through substantial evidence, that due to the claimant's failure to provide timely written notice, it was unable to effectively

[8] Claimant's foreman, Mr. Stewart, testified that Claimant had a long history of foot problems, but had never suggested to him that they were work related. The same testimony was provided by the general foreman, Mr. Rushing; and Employer's medical administrator, Ms. Berry, could find no record of an injury report until October 2003.

investigate the injury to determine the nature and extent of the illness or to provide medical services. *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997). A conclusory allegation of prejudice or of an inability to investigate the claim when it is fresh is insufficient to meet employer's burden pursuant to Section 12(d). *See Jones Stevedoring Co. v. Director, OWCP*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997).

In this case, Employer asserts that it was prejudiced by Claimant's failure to timely notify. Employer specifically points to the fact that Claimant was off work for over a year and underwent at least five surgical procedures during that time which have resulted in "extensive disability" with little benefit to Claimant. Employer argues that the multiple surgeries performed by Dr. Borcicky have confused the record to the point that when Employer wanted a second opinion, Dr. Benus could not render an opinion as to the cause of Claimant's problems and Dr. Salloum could obtain only an erratic history. Employer also points out that Claimant's surgical history was so extensive that two other physicians refused to become involved in Claimant's case. In sum, Employer contends that as a result, the failure to timely notify has interfered with Employer's medical evaluations and investigation.

Claimant, on the other hand, asserts that Employer was not prejudiced because Claimant has been treated by Dr. Borcicky who is one of four board-certified podiatrists in Mobile, Alabama. Claimant does not dispute that two physicians declined to offer opinions in Claimant's case, but notes that neither Dr. Salloum nor Dr. Benus opined that Dr. Borcicky's treatment was not reasonable and necessary.

Based on the foregoing, I find that Employer has established, through substantial evidence, that it was prejudiced by Claimant's failure to give timely written notice. The purposes underlying the timely notice requirement, effective investigations, providing effective medical treatment, and preventing fraudulent claims, support my conclusion. *See Kashuba v. Legion Insurance Co.*, 139 F.3d 1273, 32 BRBS 62(CRT) (9th Cir. 1998); *Port of Portland v. Director, OWCP*, 932 F.2d 836 (9th Cir. 1991). Here, Employer should have been afforded an opportunity to investigate Claimant's initial claim of injury, and at a minimum should have been able to participate in Claimant's medical care by obtaining a second opinion before multiple surgeries were performed on Claimant. Dr. Borcicky testified in his deposition that every time he performed a subsequent surgery to treat Claimant's condition, Claimant developed another problem (CX 1, p.11). Thus, with Employer being unaware of the work-relatedness of Claimant's

condition until October 24, 2003, it may now be difficult for Employer to determine the circumstances of Claimant's initial injury and the origin of his condition in light of his current disability and his pre-employment medical history.

In sum, I find that Claimant did not timely notify Employer of his injury within thirty days of his being aware of the relationship between his injury, his employment, and the likely impact on his wage-earning capacity. Claimant's failure to timely notify is not excused pursuant to Section 12(d), because knowledge of the injury cannot be imputed to Employer, and Employer has demonstrated through substantial evidenced that it was prejudiced by Claimant's failure to give timely written notice. Consequently, Claimant's claim for compensation is barred.

Section 7 Medicals

Having determined that Claimant's claim for compensation is barred, the issue of medical benefits must still be resolved because a claim for medical benefits is never time barred. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988). An employer has a continuing obligation to pay an injured employee's medical expenses, even if the claimant's claim for compensation is time-barred by Section 12 or 13. *Strachan Shipping Co. v. Hollis*, 460 F.2d 1108 (5th Cir.), *cert. denied,* 409 U.S. 887 (1972); *Wilson v. Southern Stevedore Co.*, 1 BRBS 123 (1974). An employer has the same obligation even if the employee is no longer employed by the employer. *See Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13(CRT) (9th Cir. 1983).

In order to establish whether Employer is responsible for medical expenses, it is necessary to determine the issue of causation, for Claimant is entitled to reasonable and necessary medical expenses if his injury is work-related. 33 U.S.C. § 907; *Colburn*, 21 BRBS at 222. The Section 20(a) presumption applies to the issue of whether an injury is causally related to a claimant's employment. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466(CRT) (D.C. Cir. 1976).

Causation

The claimant has the burden of establishing a prima facie case of compensability. Section 20(a) of the Act provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm or pain and that employment conditions existed which could have caused, aggravated or accelerated the condition. *Merrill v. Todd Pacific*

Shipyards Corp., 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Bldg. Co*., 23 BRBS 191 (1990). In addition, if a claimant's employment aggravates a prior condition, the resulting disability is compensable. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc); Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979), *aff'd sub nom*. *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). The Section 20(a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.,* 16 BRBS 98 (1984).

Once the claimant has invoked the presumption the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003), *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. *Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the Section 20(a) presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In the present case, Claimant testified that he suffered pain in his feet, and this complaint was documented in Dr. Borcicky's medical records. Witnesses who testified at the formal hearing stated they were aware of Claimant having pain in his feet. Claimant testified that he worked as a shipfitter, and that this position required him to carry a tool bag weighing at least 80 pounds, and he frequently had to move metal plates which weighed between 150 and 200 pounds. Claimant testified that his job required bending, stooping, crawling, and climbing on scaffolds, poles and ladders. He was required to wear steel-toed boots while performing his duties and testified that he walked on steel "constantly." Dr. Borcicky testified that Claimant would have had problems with his feet regardless of his occupation, but that the weight-bearing and requirement of wearing steel toed boots accelerated Claimant's condition. Employer's orthopedic surgeon, Dr. Salloum, noted that Claimant's condition was an aggravation caused by his work for Employer (CX 3, p.3).

From the above evidence, I find that Claimant has established a prima facie case, and consequently, the burden shifts to Employer to produce substantial evidence that Claimant's condition is not related to his work. Despite Employer's protestations, I find that it has not shouldered its burden. Employer asserts that Claimant had foot problems dating back to 1985 which are no different than those he was treated for after June 18, 2002. Secondly, Employer points to the fact that

Dr. Borcicky certified on group disability forms that the Claimant's condition was not work related. However, I do not find either argument persuasive.

The fact that Claimant had problems with his feet does not preclude the fact that his employment could have aggravated or accelerated his condition, as was the opinion of Drs. Borcicky and Salloum. Further, the fact that Dr. Borcicky checked off a box on a form indicating that Claimant's condition was not work-related is not sufficient evidence of rebuttal in light of his testimony, where Dr. Borcicky was free to explain his opinion. Employer has presented no evidence which controverts the opinions of Drs. Borcicky and Salloum. Accordingly, I find that Claimant established a prima facie case and the Section 20(a) presumption has not been rebutted.

In order for a medical expense to be assessed against an employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. Therefore, a judge may reject payment for unnecessary treatment. 20 C.F.R. § 702.402; *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 187 (1988). A claimant establishes a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255 (1984). If an employer has no knowledge of the injury, it cannot be said to have neglected to provide treatment, and the employee therefore is not entitled to reimbursement for any money spent before notifying the employer. *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10 (1983).

In this case, Claimant did not indicate Dr. Borcicky as his physician of choice until he completed the accident/injury report on October 24, 2003. After that time, however, Employer has not introduced any evidence that the care rendered by Dr. Borcicky after this time was not reasonable or necessary. Claimant was examined by two physicians of Employer's choice, Drs. Benus and Salloum, and neither noted in their records that they disapproved of Dr. Borcicky's treatment as either unnecessary or unreasonable. As a result, I find Employer is responsible for all reasonable and necessary medical treatment provided by Dr. Borcicky after October 24, 2003.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay for all reasonable and necessary Section 7 medical expenses incurred after October 24, 2003, resulting from Claimant's injuries of June 18, 2002;

(2) Employer/Carrier owes Claimant no compensation; and

(3) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response.

So ORDERED this 25th day of January, 2005 at Metairie, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

CRA:bbd